COUNTER-STATEMENT OF QUESTIONS INVOLVED

The Appellee accepts the statement of the questions set forth in Appellant's brief except as to Question I.

Counter-Question I

WAS FRAUDULENT PROCUREMENT OF NATURALIZATION ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE?

The Court below answered "Yes".

The Appellee contends the answer should be "Yes".

The Appellant contends that the answer should be "No".

Question II.

IS INTRISIC FRAUD A BASIS FOR DENATURALIZATION?

The Court below answered "Yes".

The Appellee contends that the answer should be "Yes".

The Appellant contends that the answer should be "No".

QUESTION III.

WAS ILLEGAL PROCUREMENT OF NATURALIZATION ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE?

The Court below answered "Yes".

The Appellee contends that the answer should be "Yes".

The Appellant contends that the answer should be "No".

QUESTION IV.

WAS THE NATURALIZATION JUDGMENT RES JUDICATA?

The Court below answered "No".

The Appellee contends that the answer should be "No".

The Appellant contends that the answer should be "Yes".

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IN THE

United States Court of Appeals for the Sixth Circuit

No. 12,349

PIETRO CORRADO, a/k/a Peter Corrado,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OF THE UNITED STATES OF AMERICA, PLAINTIFF AND APPELLEE

COUNTER-STATEMENT OF FACTS

(Figures in parentheses followed by the letter a refer to pages of Appellant's printed appendix)

The Appellee, the United States of America, believes a counter-statement of facts is necessary.

Appellee filed its Complaint on November 28, 1952, under and pursuant to Section 338(a) of the Nationality

Act of 1940, (8 U. S. C. 738(a); Appellant's Brief, page 6), which provides for the revocation and setting aside of the order admitting a person to citizenship and cancelling the Certificate of Naturalization on the ground of fraud or illegality. (The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act (66 Stat. 280), but any proceedings existing at the time of the effective date of the Act (December 24, 1952) was continued in force and effect by the saving clause of the Act—Section 405(a)).

The Government charged in its Complaint that the order admitting appellant to citizenship and his Certificate of Naturalization should be set aside for:

1. Fraud: In that appellant wilfully and fraudulently made false representations during the course of his naturalization proceedings, concealing material facts, to wit: his record of arrests; and thereby precluding proper examination and investigation into his qualifications for citizenship;

2. (a) Illegality: In that appellant's naturalization was procured in violation of the Fourth Subdivision of Section 4 of the Act of June 29, 1906, Chapter 3592, as amended by Section 6(b) of the Act of March 2, 1929, Chapter 536 (45 Stat. 1513; Appellant's Brief, page 5), in that he was not a person who had during the five years preceding the filing of his petition for citizenship behaved as a man of good moral character, inasmuch as he made the false statements heretofore referred to, concealing from the Naturalization Examiner and the Court his record of arrests, and thereby precluding examination into his qualifications as a person of good moral character;

(b) Illegality: In that appellant's naturalization procured in violation of the Fourth Subdivision of Section 4 of the Act of June 29, 1906, as amended by the Act of

March 2, 1929, in that he was not a person who had been, during the five years preceding the date of his petition for citizenship, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

The appellant, Pietro Corrado, was naturalized in the United States District Court in the Eastern District of New York, Brooklyn, New York, on August 18, 1931. The appellee charged in its complaint that the appellant during his naturalization proceedings made false statements and concealed from naturalization officials and the Naturalization Court, that he had been arrested or charged with violations of law (4a). Evidence at the denaturalization trial disclosed that appellant's Application for a Certificate of Arrival and Preliminary Form for Petition for Citizenship (Exhibit 1; 479a), signed by him, contained the answer "*No*" to question 29, "Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation?" Subsequently, during preliminary examination on May 18, 1931, before Naturalization Examiner Frank L. White, he was interrogated about this and other questions on said Preliminary Form (63a-66a) and the questions were checked by the Naturalization Examiner with a check mark (64a). Naturalization Examiner White testified that he reviewed each question with the appellant, an applicant for citizenship, "in order to find out whether or not he had answered it correctly, and to make any necessary changes, and the check mark indicated that he, in his answer to me, said the answer was correct as written in the application" (64a-65a).

Naturalization Examiner White further testified that the symbol "N. C. R.", in his handwriting on the reverse side of the triplicate copy of appellant's petition for naturalization (Exhibit 2; 484a) was the abbreviation for "No

criminal record" and meant that appellant had informed him that he had no criminal record (67a, 77a); that the Naturalization Examiner was concerned with appellant's arrest record, if any, because an arrest record, if one existed, would "cast a shadow" on the applicant's good moral character (85a), and to otherwise determine his qualifications for citizenship (65a).

Through a series of witnesses and documents it was established that appellant was arrested several times prior to and during the year 1931. The lower court, in its findings of fact, made the following statements concerning appellant's criminal record (500a-501a):

> "On July 19, 1946, defendant, through an attorney, asked the Superintendent of Police in Detroit to remove his record except for the two misdemeanors, since 'no convictions occurred subsequent to' the other arrests. This was as provided by Michigan Statute, C. L. 1929, Sec. 569 (M. S. A. Sec. 4.463).
>
> "Following is the list of arrests and their dispositions, which occurred prior to and during 1931, as submitted by defendant's attorney to the Detroit Police Department Superintendent at the time defendant's record was expunged:

"6/25/23	Dis. peace	$25.00 or 30 days Heston
3/24/24	Fel. asslt.	Dismissed
1/16/25	Viol. Dyer Act	TOT. U. S. Marshal
8/6/25	R. A.	Dismissed
3/30/26	C. C. weapons	Discharged
4/13/27	CCW Capias	Discharged
8/2/27	Freq. Gamb. Pl.	$10.00 or 10 days
2/19/29	Murder	Discharged
3/15/29	U. S. Immigration	Discharged
10/28/31	Murder	Nolle Prossed
12/10/31	Fugitive	TOT. Wyandotte, Mich. PD.

Not included in the above list are the following arrests, which were proved by the government at the trial:

3/13/24	Murder	Dismissed on writ 3/15/24
7/26/24	Robbery Armed	Dismissed by Super. 7/29/24
9/25/24	Robbery Armed	Dismissed by Super. 9/26/24
11/7/24	Arrested on Investigation	Released on bail—bail forfeited —no disposition
1/13/25	Robbery Armed	Dismissed by Super. 1/16/25
4/26/25	Robbery Armed	Dismissed by Super. 4/28/25

"It will be noted that the first nine charges listed by defendant at the time he expunged his record include felonious assault, violation of the Dyer Act, robbery armed, carrying concealed weapons, murder and violation of the immigration laws. Defendant was also finger-printed. The arrests not so listed by defendant include murder and robbery armed and the arrest on 'investigation' on November 7, 1924, was in Rochester, New York. At the trial defendant admitted being arrested in Rochester, New York and posting bond—'And I haven't heard from it since.'

"The robbery armed charge of August 6, 1925, was in Detroit, and was not dismissed until September. In this matter defendant put up bond and as he had done before hired a prominent attorney to represent him.

"The arrest for murder in February, 1929, terminated the same day. The one on March 13, 1924, was dismissed on writ March 15, 1924.

"During the course of the trial the government also sought to prove other arrests taking place subsequent to the date of naturalization under *Luria v. U. S.*, 231 U. S. 9; *U. S. ex rel. Harrington v. Schlot-*

feldt, 136 F. 2d 935; *Baumgartner v. U. S.*, 138 F. 2d 29 (reversed by the Supreme Court, 322 U. S. 665 on other ground); and *Turlej v. U. S.*, 31 F. 2d 696. However, this court, on objection by defendant, refused to permit any evidence concerning defendant's alleged improper actions after his naturalization, except to show that on March 9, 1931, while his application for citizenship was pending in Brooklyn and before he was naturalized, an indictment for murder had been returned against him in Detroit and also that he was charged as a fugitive from justice on October 10, 1931. The indictment was for the same murder for which defendant was arrested on February 19, 1929 before going to New York to live. This indictment was the basis for arrest for murder on October 28, 1931, after defendant was naturalized and had returned to Detroit. He was placed on $10,000.00 bond for this charge, but the case was nolle prossed January 20, 1932."

The court's findings as to appellant's arrests and convictions are not disputed by appellant in this appeal.

After receipt of all evidence, including testimony by the appellant, the court held that appellant's citizenship had been fraudulently and illegally procured. The court in its findings of fact found that appellant, since his arrival in the United States in 1921 to and including 1931, had been arrested seventeen times, including two convictions (500a-501a). As a conclusion of law, the court found that appellant deliberately made false statements when he stated in his Application for Certificate of Arrival and Preliminary Form for Petition for Citizenship (hereinafter referred to as Preliminary Form) that he had never been arrested or charged with violation of any law, and that he also repeated this falsification to the Naturalization Examiner (503a-504a). The court held that the false statements were material misrepresentations (504a). The

court further declared that it disbelieved appellant because of his evasiveness while on the witness stand and his repetitious "I don't remember" in answers to questions about his arrests (507a). The court also pointed out that appellant was not the "ignorant foreigner", an impression he sought to impose upon the court (507a).

Appellant, in his brief, has tried to make much of the fact that the trial judge originally disbelieved that there were stores opposite the Federal Court in Brooklyn where applicants for citizenship could go to obtain assistance in the preparation of their naturalization papers (Appellant's brief pages 2 and 17). At a hearing on a motion of appellant to reopen proofs held on Monday, February 8, 1954, the court points out that what he meant, when he said he disbelieved the appellant, was not as to the places across from the court house in Brooklyn but appellant's story that he told a man at one of these places about his arrests and for some unknown reason the man did not put it down. The court talked about the "mysterious stanger" and stated:

> "That seemed so farfetched to me that I told him that I did not believe his story."

Continuing, the court had this further to say:

> "When he (attorney for appellant) says that the court intimated he did not believe the defendant he was putting it mildly. I told him I did not believe him, just as strongly as I could." (Parenthetical insertion added.) (Appellee's Appendix 2b.)

The transcript of the proceedings on a motion to reopen proofs held February 8, 1954, are included in Appellee's Appendix.

ARGUMENT

(The appellee in this brief will follow the outline adopted in appellant's brief, repeating the principal subheadings contained in that brief and referring to the issues as raised by each subheading.)

COUNTER-QUESTION I

WAS FRAUDULENT PROCUREMENT OF NATURALIZATION ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE?

The Court below answered "Yes".
The Appellee contends the answer should be "Yes".
The Appellant contends that the answer should be "No".

A. Scope of Review on Appeal, Character of Burden of Proof.

The Government recognizes that cancellation of naturalization is a serious matter, but fraud once proven by "clear, convincing, and unequivocal evidence" is also a serious business.

The Courts, once fraud or illegality has been proven by clear, convincing, and unequivocal evidence, have shown no reluctance in cancelling citizenship. Congress has provided, in Section 338(a) of the Nationality Act of 1940, for denaturalization on the ground of fraud and illegality. That provision was created to provide added protection for fraud committed against the United States Courts. (*Knauer v. U. S.*, 328 U. S. 654, 672-3.)

Appellant in his brief, page 9, states that in denaturalization cases, findings by the lower court do not have the same weight as in other civil cases. This is true only in the sense that such findings are not conclusive and may be reviewed by the appellate court to determine whether

the evidence is "clear, convincing, and unequivocal". The credibility and veracity of the witness is for the trial court. In *Brenci v. U. S.*, 175 F. 2d 94 (C. A. 1, 1949) the court discussed the consideration to be given by appellate courts to the findings of trial courts in denaturalization cases:

> "And in addition we interpret them (referring to decisions of the Supreme Court) as requiring appellate courts to make their own findings of ultimate facts, at least in cases, unlike the one at bar, where a decision cannot 'escape broadly social judgments —judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.' *Baumgartner v. United States, supra,* 322 U. S. at page 671, 64 S. Ct. 1240, 88 L. Ed. 1525. *But we do not interpret them as authorizing appellate courts to make independent findings of evidentiary facts of an objective nature when the credibility of a witness is an important factor in reaching a decision.*" (Parenthetical insertion and emphasis provided.)

In the case at bar the decision of the lower court did not involve "broad social judgments" as in *Baumgartner v. United States,* 322 U. S. 665, cited by appellant and mentioned above. The primary issues before the lower court in this case were whether the appellant had been arrested prior to his naturalization and, if so, whether he concealed such fact from the Naturalization Examiner and the Court. In this appeal appellant does not question the finding of the trial court that he had been arrested at least seventeen times. He does question the finding of the court that appellant wilfully concealed such arrests from the Naturalization Examiner and the court. This issue does not involve broad social judgments but concerns "findings of evidentiary facts of an objective nature when the credibility of a witness is an important factor in reaching a decision" *(Brenci v. U. S., supra).*

The courts in interpreting Rule 52(a) of the Federal Rules of Civil Procedure, which relates to all actions tried upon the facts by a jury, have been in general agreement that the appellate court will not re-determine credibility of witnesses where the trial court has the opportunity to observe the demeanor of witnesses, to hear their testimony, and the trial court's determination is not clearly erroneous. See *United States v. Oregon State Medical Society*, 343 U. S. 326. The Sixth Circuit Court of Appeals has consistently held that under Rule 52(a) the witnesses' credibility is for the trial court; (*Provident Life and Insurance Company v. Bertman*, 151 F. 2d 1001, (1945); *Green v. Electric Vacuum Cleaning Company*, 132 F. 2d 312 (1942), dismissed on motion of petitioner, 319 U. S. 777; *Von Moltke v. U. S.*, 189 F. 2d 56 (1951), affirmed 343 U. S. 922). The Supreme Court in interpreting Rule 52(a) has held that "findings as to design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." (*U. S. v. Yellow Cab*, 338 U. S. 338, 341).

In *Knauer v. United States, supra*, the Supreme Court acknowledged that it had given due regard to the appraisal by the trial court of the veracity of witnesses under Rule 52(a) and concluded that the character of the evidence, *"the veracity of the witness against Knauer as determined by the District Court"*, etc., supported the quantum of evidence required by *Schneiderman v. U. S.*, 320 U. S. 118. (Emphasis provided.)

Appellant cited *Cufari v. United States*, 217 F. 2d 404 (C. A. 1, 1954) in support of its position in this matter. But that court again reasserted its position enunciated in the *Brenci case, supra*, at 217 F. 2d 408, stating that the Supreme Court in the *Baumgartner case* did not suggest "that we should wholly disregard findings of fact made

below and ourselves try these cases *de novo* and make findings of fact ourselves." The *Cufari* case merely held that "no arrest" on a docket slip without testimony of the Naturalization Examiner, who allegedly made this notation, was not sufficient evidence that Cufari was asked whether he had ever been arrested and that he had answered in the negative. In the case before this court, in addition to notations on the reverse side of the triplicate copy of the Petition for Naturalization, there is appellant's Preliminary Form signed by him, and the testimony of Naturalization Examiner White.

Furthermore, it is to be noted that on the more important issue—whether a false denial of arrest is sufficient to cancel citizenship, the Court in the Cufari case is in accord with the lower court. (See 217 F. 2d at 408-409.)

B. Proof Required to Attack Judgment on Basis of Fraud.

The Government agrees that the standard of proof in a denaturalization case is the rule laid down in the *Schneiderman case,* to wit: "clear, convincing, and unequivocal evidence."

Appellant's citations on page 10 of his brief to support the proposition that naturalization is a judicial function concern cases involving naturalization proceedings that were conducted prior to the Act of June 8, 1926 (44 Stat. 709), which created "the Designated Examiner system" of naturalization proceedings (See appellant's brief page 5). This Act removed (except in contested cases) the hearing accorded petitioner from the court room to the naturalization office before a Designated Examiner. The plain intent of Congress by this amendment was to set up an administrative body which would conduct non-judicial hearings. (*U. S. v. Scheurer,* 55 F. Supp. 243, 250, D. C. Ore. 1944, reversed on other grounds, 150 F. 2d 535.)

A naturalization proceeding is an *ex parte* proceeding. (*U. S. v. Ali*, 7 F. 2d 728; *U. S. v. Leles*, 236 Fed. 784, D. C. Cal. 1916; *U. S. v. Turlej*, 18 F. 2d 435, D. C. Wyo. 1927; *U. S. v. Scheurer, supra; U. S. v. Parisi*, 24 F. Supp. 414; *Schneiderman v. U. S.*, 320 U. S. 118, 177, dissent by C. J. Stone.)

In the *Scheurer case, supra*, District Judge James Alger Fee, who himself had handled many naturalization petitions, devoted an ample portion of the Opinion in a discussion of the naturalization procedure. In that case as in the case at bar the naturalization petition was filed and the petitioner given a routine examination by a Naturalization Examiner. The examination of the petitioner and witnesses was not in open court. No information derogatory to the petitioner was divulged to the Naturalization Examiner. The petitioner established his eligibility to citizenship to the satisfaction of the Examiner. The petitioner was recommended to the court for citizenship without the court examining him or his witnesses, the petition for citizenship or without making any finding as to any fact. Only if the Naturalization Examiner had objected to the naturalization of petitioner would the court have examined the petitioner and received evidence.

Appellant's naturalization proceeding was not a judicial proceeding, in a sense that a trial was had and evidence presented, etc. The naturalization court merely acted upon recommendation of a Designated Naturalization Examiner without hearing any evidence or examining the petitioner for naturalization.

In a dissenting opinion by Chief Justice Stone in the *Schneiderman* case, 320 U. S. at 175-178, it is pointed out that Congress intended for the naturalization proceeding to be simple and inexpensive by permitting it ordinarily to be *ex parte;* that Congress provided for a revocation

proceeding as a separate and independent opportunity for the Government to cancel citizenship if perchance citizenship was improperly procured. The revocation statute was designed to afford cumulative protection against fraudulent and illegal naturalization. (*U. S. v. Ness*, 245 U. S. 319, 327).

C. Elements Necessary to Establish Fraud and Character Proof Required.

D. Application of principles to Instant Case.

In discussing the nature of fraud it appears that appellant has avoided the definition of fraud in denaturalization cases as enunciated in the *Knauer case, supra.* In the latter case the Supreme Court defined "fraud" as connoting "perjury, falsification, concealment, misrepresentation" (328 U. S. 654, 657). Any falsification, concealment, or misrepresentation in a naturalization proceeding concerning matters about which the Government is entitled to know is ground for revocation in a subsequent denaturalization proceeding.

The law imposes upon the petitioner for naturalization the burden of proving every condition upon which admission to citizenship depends, including that he has behaved as a person of good moral character during the period required by law (*Tutun v. U. S.*, 270 U. S. 568). In fulfilling this duty the petitioner must answer truthfully and faithfully questions propounded by the Government and provide information demanded in order that the Naturalization Examiners, and ultimately the Court, may determine whether the petitioner has established his eligibility to citizenship. (*Del Guercio v. Pupko*, 160 F. 2d 799, C. A. 9, 1947; *U. S. v. DeFrancis*, 50 F. 2d 497, C. A. D. C. 1931; *U. S. v. Accardo*, 113 F. Supp. 783, D. C. N. J. 1953, affirmed *per curiam* at 208 F. 2d 632, C. A. 3, certiorari denied 347

U. S. 952.) If the petitioner provides false or fraudulent information pertaining to his qualification to citizenship and relying on this information, citizenshp is granted, the Court, in a subsequent proceeding, may revoke the naturalization previously decreed.

Where an applicant for citizenship gives false information concerning a matter which the Government is entitled to be informed, the Courts will not condone such deceitful practice for it will undermine the whole procedure preliminary to naturalization and frustrate the purpose of Congress (*Knauer v. U. S., supra; Del Guercio v. Pupko, supra*). In the *Del Guercio case* (160 F. 2d at page 800) the Court pointed out that the making of a false statement (the falsification in that case being a denial of ever having been arrested or charged with the violation of any law, etc.) involves moral turpitude and exhibits an unfitness of the applicant for citizenship.

In the cases of *Sweet v. U. S.* and *Charnowola v. U. S.*, decided jointly at 211 F. 2d 118 (cert. denied 348 U. S. 819), this Circuit Court, in cases involving false representations, and concealment of membership in the Communist Party, held it was fraud in a naturalization proceeding to falsely deny membership in the Communist Party. This Court stated that concealment of membership in the Communist Party thwarted inquiry into the petitioner's eligibility for citizenship (211 F. 2d at 118). In the *Charnowola* case the Court went further and held that the concealment of membership in the Communist Party, even though outside the ten-year statutory period (8 U. S. C. 705, 1946 Ed.), was material to the issue whether he should be granted citizenship. At 211 F. 2d page 120, in approving the decision of the lower court, this Circuit Court said:

"In No. 11,912, the George Charnowola case, Judge Picard pointed out that the defendant was not charged with being a Communist, either at the present time or during the ten-year period previous to his application for citizenship; but that the gist of the Government's action to cancel his citizenship was the false information which he gave to the Naturalization Examiners under oath when he stated that he had never been a Communist when, as a matter of fact he had been. The Judge quoted from the opinion of the Supreme Court in the *United States v. Ginsberg*, 243 U. S. 472, 475, 37 S. Ct. 422, 425, 61 L. Ed. 853, *supra*, as follows: 'No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it, as provided in Sec. 15, and demand its cancellation unless issued in accordance with such requirements.'"

In the case of *U. S. v. DeFrancis, supra*, the Court held it was fraud for a petitioner for naturalization to conceal from the Naturalization Court a conviction for the sale of intoxicating liquors. The Court quoting from another case, stated at 50 F. 2d 498:

"If a party conceals a fact that is material to a transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment may be as much a fraud as if the existence of a fact were expressly denied, or the reverse of it expressly stated." (Also quoted in *U. S. v. Zgrebec*, 38 F. Supp. 127, D. C. Mich. 1941.)

The fraud or false statements need not be committed directly on the court. It is sufficient if the fraud was committed on the Government during any step of naturalization process. (*U. S. v. Saracino*, 43 F. 2d 76, C. A. 3, 1930; *U. S. v. Anastasio*, 120 F. Supp. 435, D. C. N. J., 1954). In the *Saracino case* the Court cancelled the defendant's Cer-

tificate of Naturalization on the ground that he had denied under oath before the Naturalization Examiner that he had ever been arrested, and wilfully concealed from the Naturalization Examiner and the Naturalization Court that he had been arrested and convicted, prior to naturalization, for aggravated assault and battery and assault and battery with intent to kill. The Court said that an alien seeking admission to citizenship must deal with the Government with utmost good faith; that false representations by a petitioner for citizenship to the Naturalization Examiner regarding his moral character is fraud warranting cancellation of the Certificate of Citizenship.

In the case of *U. S. v. Zgrebec, supra,* at 38 F. Supp. page 129, the court said in cancelling a Certificate of Citizenship that:

> "If we pass over lightly any false or fraudulent representations made to secure citizenship we can expect an utter contempt on the part of these who receive it, * * * that to obtain it one must approach the portal with a frankness that cannot be subject to doubt."

The Court pointed out that the duty rests upon the petitioner and not upon the United States to see that he makes no false statements. See *U. S. v. Palmeri,* 52 F. Supp. 226, D. C. N. Y., 1943.

In the case of *U. S. v. Mancini,* 29 F. Supp. 44, D. C., Penn., 1939, the defendant was charged with having procured his naturalization by fraud "by concealing facts as to his moral character, by falsely testifying under oath that he had never been arrested or charged with crime." The defendant denied that he had been asked the question. The Court stated:

> *"The law is clear that the disputed question is proper as bearing on moral character of the alien.* If the question were asked, falsely and fraudulently answered, and if the United States proved the facts by a preponderance of the evidence, (The Schneiderman decision requires the proof to be clear, convincing and unequivocal) the Certificate of Citizenship should be cancelled: *Gaglione v. United States,* 1 Cir., 35 F. 2d 496; *United States v. Saracino,* 3 Cir., 43 F. 2d 76; *United States v. Rovin,* D. C., 12 F. 2d 942." (Parenthetical insertion and emphasis provided.)

The Court decided that the disputed question was asked the defendant and he answered it falsely and fraudulently, concealing material facts concerning his character, to-wit: an unsavory list of arrests; and ordered the defendant's citizenship to be cancelled.

In *U. S. v. Accardo, supra,* the court cancelled the Certificate of Citizenship of defendant for fraud and illegality. Defendant was charged with having failed to disclose arrests and convictions prior to his naturalization which would have shown that he had been frequently in conflict with the law enforcement authorities for some fifteen years. The Court pointed out at 113 F. Supp. page 785, that

> "It was defendant's duty to disclose an arrest, as well as a conviction, in order that the Government might investigate before granting the decree. *Gaglione v. U. S.,* 1 Cir., 1929, 35 F. 2d 496; *In re Paoli,* D. C. Cal. 1943, 49 F. Supp. 128. That defendant's wilful failure to disclose this situation to the authorities had a material effect upon the action of the Naturalization officials and the Court in its decision to grant the decree, is undoubted. Particularly is this the case, since even the limited disclosures of the defendant were not passed on by the immigration officials, even tentatively, but referred to the Court for its own decision thereon."

The Third Circuit Court of Appeals in affirming the Accardo decision *per curiam* (208 Fed. 2d 632), stated that it agreed with the opinion of the District Judge and "it would be a waste of words to add anything to his opinion."

False statements during any step of a denaturalization proceeding were held sufficient grounds for cancellation of naturalization certificates in the following additional cases: *Johannessen v. U. S.*, 225 U. S. 227; *U. S. v. Rutman*, 27 F. Supp. 891, D. C. N. Y. 1939; *U. S. v. Goldstein*, 30 F. Supp. 771, D. C. N. Y. 1939; *U. S. v. Marino*, 27 F. Supp. 155, D. C. N. Y. 1939; *U. S. v. Etheridge*, 41 F. 2d 762, D. C. Ore. 1930; *U. S. v. Goglia*, 21 F. Supp. 894, D. C. N. Y. 1938; *U. S. v. Marcus*, 1 F. Supp. 29, D. C. N. J 1932; *Schwinn v. U. S.*, 112 F. 2d 74, C. A. 9, 1940, cert. denied 311 U. S. 616. In the latter case the Court of Appeals had this to say applicable to the facts before this court:

> "Here the party seeking citizenship had adequate means of ascertaining the truth or falsity of the statements he and his witnesses made in the application, and could have avoided the false representations which accompanied his application to the Court of a nation whose beneficences he sought, by scarcely more than a casual checking of the facts."

The Fifth Circuit Court of Appeals denied citizenship to an applicant for naturalization who, during his preliminary examination before Naturalization Examiners, in order to facilitate and insure his naturalization, gave false statements concerning his arrest record. The Court denied the petition for naturalization notwithstanding that "in his numerous brushes with the law, information as to which was withheld by him, the applicant had not been convicted of a felony." (*U. S. v. Docherty*, 212 F. 2d 40, C. A. 5, 1954).

Where the petitioner had informed the Naturalization Examiner that he had only been arrested once and that arrest was merely for speeding, but the petitioner had in fact been arrested fifteen other times (12 times for failing to pay wages, 2 times for traffic violations, one time for obtaining money by false pretenses), the District Court was warranted in denying the petition for citizenship. (*Stevens v. U. S.*, 190 F. 2d 880, C. A. 7, 951). The Court said at page 881:

> "We have no doubt but that a false statement knowingly made by an applicant for naturalization in the course of such proceeding would afford a proper basis for denying the application, and it is immaterial that the false statement knowingly made concerned violations which occurred previous to the five-year period. On this point we agree with a recent decision of the Illinois Supreme Court, *Sodo v. United States*, 406 Ill. 484, 94 N. E. 2d 325, and this is so notwithstanding that such violations standing alone would not afford a proper basis for the denial of the petition."

In *U. S. v. Anastasio, supra*, the defendant was asked in 1931, in an Application for Registry before the Immigration Service, whether he had ever been arrested and he answered "No". A record of registry was created for Anastasio and this record was the basis for the issuance of his Certificate of Arrival in his subsequent naturalization proceeding. Anastasio was naturalized and subsequently it was discovered that he had been arrested and convicted several times prior to his registry hearing in 1931. After holding that the fraud in the registry proceedings invalidated every step in the naturalization proceedings and subject's citizenship would be revoked, the Court went on to say:

> "It was his duty to fully and honestly disclose, both in his application and upon oral examination his prior arrests and convictions. *This evidence was relevant and material to the subject matter of inquiry.*" (120 F. Supp. at 440.) (Emphasis provided.)

MATERIALITY

It is the position of the Government that a false denial by a petitioner for naturalization that he has any arrests, etc., is fraud in a denaturalization case if said denial is either "perjury, falsification, concealment, misrepresentation" and, therefore, within the definition laid down in the *Knauer* decision, *supra*. If the cases already cited do not conclusively resolve the question of materiality of such false denial, the case of *Gaglione v. U. S.*, 35 F. 2d 496, C. A. 1, 1929, certiorari denied 281 U. S. 712, should erase all doubts on this point. In that case the Court of Appeals, First Circuit, upheld a conviction for perjury in a naturalization proceedings where the defendant, under oath, before a Naturalization Examiner denied that he had ever been *arrested* whereas he had in fact been arrested several times. The Court held that the inquiry as to whether defendant was arrested was pertinent to a determination whether he had been a person of good moral character during the statutory period, and a false swearing or perjury in a naturalization proceeding was a violation of Section 142, Title 18 U. S. C. (1927); 35 Stat. 1103, which provided:

> "Whoever in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken shall be fined not more than $1,000 and imprisoned not more than five years."

Indictment for the same offense and holding that inquiry into applicant's naturalization record of arrest is material upheld in *U. S. v. Bressi* (208 F. 369, D. C. Wash. 1913). The courts have also upheld the materiality of inquiry into arrests of a witness of a petitioner for naturalization, sustaining conviction of the witness under 18 U. S. C. 142, quoted above (*Rein v. U. S.*, 69 F. 2d 206, C. A. 3, 1934). The Court, in the Rein case spoke as follows at page 207:

> "A false answer that conceals his lack of qualification to testify or that heads off further inquiry is precisely what the statute forbids. Although the mere arrest of a person does not prove that he is a man of bad moral character, the inquiry in these proceedings as to arrest of a witness is but the first step of others that normally would follow in ascertaining the qualification of the witness to testify. And so the question here asked of the defendant—as to whether he had ever been arrested—was, we think, proper, at least preliminarily, for according as he truthfully answered 'No', the government was thwarted in its inquiry and was thereby induced improperly to grant citizenship to one not shown to be qualified to receive it. Thus, in view of the nature of the proceeding, the false answer became material. * * *"

There can be no doubt but that appellant Corrado's denial that he had ever been arrested or charged with any violations, etc. was a deliberate and wilful false statement, a fraudulent misrepresentation intended to deceive the naturalization officers and the Court. He denied in his Preliminary Form for Petition for Citizenship (Exhibit 1) that he had ever been arrested or charged with any offense. He well knew at that time that he had been arrested and charged with a number of criminal offenses and had suffered convictions on at least two occasions. Former Naturalization Examiner White testified that the checkmarks on

the foregoing application indicated that he had reviewed the said application wtih the appellant and had verified his answers; that the notations by Examiner White on the triplicate copy of the Petition for Naturalization (Exhibit 2) indicated that appellant had told him that he had no criminal record (67a, 77a). The appellant denied ever having been arrested or charged with any offense when he well knew that he had been arrested many times, brought to the police station and even detained in jail over night; that he had been indicted or charged for criminal violations, arraigned in court, and even subjected to trial; that he had executed bonds after arrest to gain his freedom, some of these bonds involving sums of several thousand dollars; that he had been arrested and charged with murder in Detroit in 1929. At the time of appellant's naturalization an indictment was outstanding charging him with murder. Just a few weeks before his naturalization the Federal Court dismissed a Dyer Act indictment pending against him. It is inconceivable that appellant did not know of the murder charge or the Dyer Act dismissal. At least he knew and did admit that he had been arrested prior to his naturalization several times. He was well known to the police officers, who were assigned to the Black Hand Squad in Detroit. The only conclusion to be drawn from appellant's denial that he had ever been arrested or charged with any violation is that appellant knew that disclosure would have resulted in an investigation, and unfavorable action would be taken on his petition for naturalization.

Congress has required a petitioner to show that he has behaved during the statutory period as a person of good moral character in order to show his fitness for citizenship. An applicant therefore can be required to disclose any past history of arrests, etc. This is material to an inquiry as to whether he is a person of good moral char-

acter. An alien can only become a citizen by becoming a witness in his own behalf, speaking freely and truthfully regarding his qualifications and fitness for citizenship. The District Court stated in *U. S. v. Charnowola, supra,* at 109 F. Supp. at 811:

> "In other words, every applicant for citizenship in this country must come in with clean hands. There can be no fraud in the securing of that citizenship, whether that fraud be failure to disclose what it is obvious must be material or be an outspoken misrepresentation."

Inquiry into the arrest record of a petitioner is so closely related with determination of good moral character as to require no further comment. A history of arrests will precipitate further examination and investigation of the petitioner. The purpose of Question No. 29 (Exhibit 1; 479a), "Have you ever been arrested or charged with violation of any law of the United States or State or any City ordinance or traffic regulation?" was to determine whether the appellant had been arrested, etc., and, if so, to have an "opportunity for adequately investigating whether reasons exist for denial of the petition" (*U. S. v. Ness,* 245 U. S. 319 at 323). By making false statements during the naturalization process appellant committed fraud and precluded investigation into his fitness for citizenship, to-wit: his good moral character and disposition toward the good order and happiness of the United States (*U. S. v. Accardo, supra*).

Appellant contends that arrests prior to the five-year period from August 18, 1931, the date he was naturalized, should not have been considered by the court below (Appellant's brief, page 14). Appellant argues that whatever occurred prior to this period is not material to the question of appellant's good moral character during the statutory period.

The United States Circuit Courts which have passed on the question are in accord that inquiry may be made into matters relating to petitioner's eligibility for citizenship antedating the statutory period; that evidence of violations or activities prior to the statutory period, if relevant, may be considered in order to determine whether the petitioner was possessed of the necessary prerequisites for citizenship during the statutory period (*Molson v. Young*, 182 F. 2d 480), C. A. 5th, 1950; *Yuen Jung v. Barber*, 184 F. 2d 491, C. A. 9th, 1950; *Marcantonio v. U. S.*, 185 F. 2d 934, C. A. 4th, 1950; *Ralich v. U. S.*, 185 F. 2d 784, C. A. 8th, 1950; *Krausse v. U. S.*, 194 F. 2d 440, C. A. 2nd, 1952.

In *Molsen v. Young, supra*, 182 F. 2d at 483, the court said:

> "The statute does not require that the evidence necessary to meet the test of loyalty and good character be confined to the five-year-period. It merely disqualifies for citizenship those who cannot show the requisite loyalty and good moral character for at least five years prior to their application, and thereby fixes the minimum requirement as to the statutory qualifications which petitioners for citizenship must meet."

Chief Judge Parker in *Marcantonio v. United States, supra*, 185 F. 2d at 936 stated:

> "We entirely agree that evidence of offenses committed prior to the five year period prescribed by the statute could be received and considered with other evidence as a basis for finding that the petitioner had not shown good character within the five year period and at the time of the application as the statute requires. *Molson v. Young*, 5 Cir., 182 F. 2d 480, 483; *Yuen Jung v. Barber*, 9 Cir., 184 F. 2d 491."

On page 14 of appellant's brief there is quoted an excerpt from the *Marcantonio* case which, taken out of context, makes it appear that the case stands for the proposition that the court will not consider any evidence of conduct or crimes prior to the statutory period. But this is what the court said in that case, immediately preceding the excerpt that appears in appellant's brief (185 F. 2d at 937):

> "The learned judge below did not distinguish, we think, between considering evidence of crimes committed prior to the five year period as bearing upon the question of character within that period and denying a petition for naturalization on the basis of such crimes. The former is permissible for the reason that the judge may consider any proper evidence having reasonable tendency to prove or disprove good character; *and the fact of petitioner's having committed serious crimes at any time during his life has a bearing on his character.*" (Emphasis provided.)

Even in the Second Circuit where appellant was naturalized, the court held in *Krause v. U. S., supra,* 194 F. 2d at page 442, that conduct prior to the statutory period "if not too remote in time, is substantially relevant to his mental attitude during the critical period." The issue in the Krause case was attachment and not good moral character.

Appellant cites *Petition of Zele,* 140 F. 2d 773, decided by the Court of Appeals, Second Circuit, in 1944, and *U. S. v. Rubia,* 110 F. 2d 92, decided by the Court of Appeals, Fifth Circuit, 1940, in support of his position on the foregoing question.

In the *Zele case* the petitioner swore falsely in connection with an Application for Declaration of Intention more than five years prior to the filing of his Petition for Natu-

ralization. During the five year statutory period he confessed to the false statement, alleging that he had received bad advice. The Court, adhering to a "liberal" statutory construction, said that it would not deny citizenship to the applicant for a false statement made more than five years from the date of the petition for naturalization The *Zele case* is not comparable to the case at bar, inasmuch as Zele was truthful during the five-year period whereas Corrado concealed and misrepresented the truth.

In the *Rubia case* the petitioner was convicted twelve years prior to his petition for naturalization. In that case, as the Court pointed out, the Government did not seriously urge that this was an impediment to naturalization, there being no false denials concerning said conviction. Consequently the *Rubia* case is no precedent in the case at bar. Furthermore, whatever value the Zele and Rubia cases may have been to appellant's argument has been erased by the later expressions of the Second and Fifth Circuits in the *Krause* and *Molson v. Young* decisions, respectively.

At this point it should be noted that the Government sought to place before the trial court appellant's post-naturalization conduct in order to show a continued pattern of behavior and, as pointed out by the trial court, as tending to reflect on his credibility and tending to show whether or not appellant lied during his naturalization proceeding (253a-261a). The lower Court offered to permit appellant to put into evidence proof of his good moral character after his naturalization, and upon appellant's refusal to accept this tender, the Court refused the government's request to inquire into appellant's bad conduct after naturalization (468a-469a). Evidence of activities after naturalization is admissible if it has a bearing on petitioner's good moral character or attachment to the Constitution prior to naturalization, his oath of allegiance, or portrays a

pattern of conduct (See citations in lower court's opinion (501a); also see *Knauer v. U. S., supra*, 328 U. S. at 668; *U. S. v. Accardo, supra*, 113 Fed. Supp. at 786; *U. S. v. Eichenlaub*, 180 F. 2d 314, C. A. 2, 1950, Cert. den. 339 U. S. 983; *U. S. v. Chruszcak*, 127 F. Supp. 743, D. C. Ohio, 1954, affirmed Dec. 13, 1954, C. A. 6).

In *U. S. v. Boano*, 16 F. R. D. 379, D. C. N. Y., 1954, the court said:

> "It is also well established that defendant's conduct and actions subsequent to his naturalization may be relevant in determining whether his statements at the time of naturalization were truthful."

It is the contention of the Government that if appellant made false representations during the naturalization proceedings concerning a matter which the Government is entitled to know, that he committed fraud and his naturalization is subject to cancellation for that reason; that such fraud reflects adversely on his character and consequently his naturalization also is subject to cancellation on the ground of illegality in that he was not a person of good moral character.

Appellant argues that this court should ignore his false representations and should now determine whether he was a person of good moral character when he was naturalized in 1931 on the record of arrests and convictions introduced at the denaturalization trial. He argues further that the Court below stated that had appellant revealed his entire arrest record, "it does not necessarily follow that he would have been denied citizenship" (Appellant's brief pages 14-15). But appellant omitted the remainder of the Court's findings • • • "that this was the information that the examining officers were charged by law with obtaining and to which they were entitled" (504a). The law referred to by the trial court, contained in Exhibit 3, will be set out below.

The burden of proof would have been on appellant prior to naturalization, to show that he is a person of good moral character. He argues in effect that if he can procure his naturalization by false swearing that this fraud is to be ignored, and he is to be further rewarded for his deceit by requiring the government now to assume the burden of disproving his eligibility for citizenship, which, but for his fraud would have been his burden to prove. To sustain appellant's argument would be an invitation to all aliens who may have reason to believe that they are not eligible to citizenship, to falsify or conceal, and if thereby they acquire citizenship, to confidently declare: "I could not have proven my eligibility for citizenship if I had spoken the truth. But because I committed fraud, I am not a citizen. It is not enough that you prove that I committed fraud. You must also prove that I was not eligible for citizenship when I was naturalized." Appellant, by this argument, would emasculate the revocation statute (8 U. S. C. 738) by deleting therefrom the word "fraudulent" and leave only the word "illegality". The argument put forward by appellant is the justification, if any is needed, for cancellation of citizenship for fraud. In denaturalization cases the burden of the government is to prove the fraud and/or illegality, as the case may be. Inasmuch as the commission of fraud establishes that the appellant is a person lacking in good moral character, his citizenship is also subject to cancellation for illegality.

Introduced at the trial below as Exhibit 3 were the Naturalization Rules and Regulations, July 1, 1929, which were effective at the time of appellant's naturalization. Rule 1, Subdivision G, paragraph 2 of the Naturalization Rules and Regulations at page 64 of Exhibit 3, in part, reads as follows:

"Wherever practicable preliminary examinations of applicants for citizenship and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States. *The question of possible arrests must be thoroughly covered.* If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted. * * * The questions will be repeated in different form and elaborated until the examiner is satisfied the person being interrogated fully understands them." (Emphasis provided.)

These regulations, in effect at the time of appellant's examination for citizenship, stated that "possible arrests must be thoroughly covered". Do such regulations leave any doubt about the materiality of an arrest record of the petitioner for naturalization, and the fact that the government was entitled to be informed about arrests? Not only must the applicant disclose such arrests to the Naturalization Examiner or the Court but he must also list his arrests in response to Question 29 in the Preliminary Form for Petition for Citizenship (Exhibit 1, 479a), a part of the naturalization process.

Appellant argues that mere arrests within the statutory period should not be considered by the District Court (Appellant's brief, page 15) and cites *Michelson v. U. S.*, 335 U. S. 469, as applicable to his argument. That case in-

volved the right of the Prosecuting Attorney to cross-examine Michelson's character witnesses concerning an arrest. Appellant has quoted an excerpt from the above decision to the effect that an arrest alone does not impeach or impair the credibility of a witness. What the appellant did not report was that the Michelson case also held that when an accused creates an issue of his character, that it is not error for the prosecution to inquire into his arrests, although there was not a conviction. In other words, a witness' credibility cannot be attacked by asking him if he has been arrested, but if the witness is testifying about the reputation of an accused, he may be questioned about the accused's arrests. The Supreme Court in the *Michelson case* said, at 335 U. S. page 482:

> "Arrest without more may neverthelss impair or cloud one's reputation."

Although the issues in the *Michelson case* are not in point with the case at bar, it presents this analogous situation: Whenever a person's reputation or good moral character is at issue, it is proper to inquire into arrests. A petitioner for naturalization is required by law to establish good moral character if he is to qualify himself for naturalization, and consequently his character or reputation is at issue. It is contrary to all experience to suggest that it is not proper to inquire into arrests when examining a person's good moral character.

The case of *Pearson v. U. S.*, 192 F. 2d 681, cited by appellant at page 15 of his brief, is not in point inasmuch as it involves a *criminal* case where the accused was asked whether he had ever been arrested. The court held that in *discrediting* an accused, he can only be questioned about convictions and not arrests. This is not the issue in the case at bar.

The same rule was applied in *National Labor Relations Board v. Baldwin Locomotive Works,* 128 F. 2d 39, C. A. 3, 1942, cited by appellant and is not in point. *U. S. ex rel. Castro-Louzon v. Zimmerman,* 94 F. Supp. 22, D. C. Pa., 1950, cited by appellant is a deportation case. The issue there was not whether the government had a right to inquire into arrests but whether under the facts the District Director of Immigration and Naturalization abused his discretion in not granting discretionary relief. No false statements were involved. The decision accepted the fact that in an application for discretionary relief the government has a right to inquire into arrests and "there is a duty to inquire into the facts" surrounding an arrest or charge (94 F. Supp. at 26).

The appellant argues that arrests are not material to the issue of good moral character (page 18, appellant's brief). This statement is contrary to experience and all legal expression on the subject. Not only in the field of naturalization but in many other endeavors, when inquiry must be made as to good moral character, the subject must answer as to arrests. As heretofore stated, the courts have held that arrests may affect a person's reputation. In a naturalization proceedings an inquiry into arrests serves a much broader purpose. It is the duty of the petitioner for naturalization to disclose arrests, as well as convictions, in order that the Government might conduct an appropriate investigation or make further inquiry about the arrests (*U. S. v. Accardo, supra; U. S. v. Chruszcak, supra).* Convictions are not the only basis for determining whether a petitioner is behaving as a person of good moral character. Conduct of the applicant which resulted in the arrest and which an investigation may disclose may determine whether a person is of good moral character. Can the appellant argue that a petitioner for naturalization who is under indictment for murder has a right to be naturalized without investigation by the Government?

But the real issue in this case is not whether appellant's arrests are material to a determination of good moral character, but whether a person who lies about his arrest record, including convictions, has committed fraud, and the effect of such fraud on the issue of good moral character. The government has a right to inquire into the arrest record of any petitioner for citizenship in order to uncover any evidence reflecting on his good moral character or disposition toward the good order and happiness of this Government. This very pertinent question was asked in *U. S. v. Accardo, supra,* 113 F. Supp. at 786, as follows:

> "How can a person claim to be of good moral character or well disposed to the good order and happiness of the United States at the very time he is seeking to defraud the United States, in a matter of moment to him and to the country?"

In *Brenci v. U. S., supra,* the petitioner wilfully and fraudulently failed to disclose a conviction. Petitioner contended that the conviction did not involve moral turpitude and consequently his concealment thereof was not material. The Court cancelled Brenci's citizenship for fraud, holding that concealment of the conviction was the only issue and "whether or not the crimes involved moral turpitude was not an issue"; that it is no defense in an action to cancel citizenship for fraud by wilfully concealing a conviction that the crime does not involve moral turpitude.

In the case of *Stevens v. U. S., supra,* the court denied citizenship to a petitioner who concealed arrests which occurred outside the statutory period. The petitioner argued that his falsification was not material contending that his arrests, having been made outside the statutory period, should not be considered. The Court held that the petitioner's argument was "beside the point" and that naturalization will be denied to a petitioner who knowingly and

wilfully testified falsely with respect to his arrest record in order to facilitate naturalization. The Court pointed out further that it had no doubt that a petitioner could be prosecuted for false swearing *even though the false statements concealed violations which occurred prior to the statutory period, and notwithstanding that the violations alone would not afford a proper basis for denial of the petition.*

The Court of Appeals, Sixth Circuit, in effect reached the same conclusion when it affirmed *Charnowola v. U. S., supra.* Both the trial court and the Circuit Court pointed out that the gist of the government's action was the false information which Charnowola gave the Government when he stated he had never been a Communist, when in fact he had. In that case, as in this case, the appellant argued that assuming that a false statement had been made it is not material for it related to conduct outside the statutory period. The Court of Appeals in the Charnowola case approved the lower Court's finding that the appellant should have truthfully answered the question whether he had ever been a Communist and since he had not done so he had obtained his citizenship by fraud.

In *U. S. v. Etheridge,* 41 F. 2d 762, D. C. Ore. 1930, the Court said at page 764:

> "It, of course, does not necessarily follow that, because an applicant has been guilty of some moral delinquency prior to the commencement of the five-year period, he should not be admitted; but he should, when requested, disclose the facts so that the court may be fairly advised whether upon the whole evidence it is satisfied that he has in fact been of good moral character during the five-year period. In order to determine that question, the court should be advised of his former conduct and behavior, and if it is intentionally concealed from it by the appli-

cant an order of admission will be vacated and set aside."

See also *In re Talerico*, 197 F. 1019, D. C. Pa. 1912.

On February 19, 1954, the Court of Appeals, Sixth Circuit, in affirming *U. S. v. Sweet, supra*, (decided in the U. S. District Court, Detroit, Michigan at 106 F. Supp. 634) upheld the finding of fraud by the lower court and noted that the District Judge had found "that the testimony left no doubt that the defendant had concealed his history of Communist Party membership from the naturalization authorities *and had thereby thwarted inquiry into his eligibility for naturalization.*" (Emphasis provided.)

Where an alien seeking to enter the United States makes false statements so as to preclude or circumvent inspection it is ground for deportation (*U. S. ex rel. Natali v. Day*, 45 F. 2d 112, C. A. 2, 1930; *U. S. ex rel. Volpe v. Smith*, 62 F. 2d 808, C. A. 7, 1933). In the latter case the court said at page 612:

> "*What the officer would have discovered or might have discovered, had the inspection not been thwarted, is beside the question. The inspection contemplated was defeated. In legal effect, there was no inspection.*" (Emphasis provided.)

This statement can be applied with equal force to the case at bar.

The materiality of appellant's arrests and convictions in a naturalization or a denaturalization case loses its importance where there is fraudulent concealment in the procurement of naturalization. If the fraud had been detected prior to naturalization, the fraud itself would become material, inasmuch as it would have a direct and material bearing on applicant's good moral character. Simi-

larly, if the fraud is not detected and the alien is naturalized, then in a later denaturalization suit for fraud, the facts which constitute the fraud is the primary and material issue before the court. Whether the conduct (or criminal record), that the alien concealed, would or would not have been grounds for denial of the petition need not be decided at the denaturalization trial. At a denaturalization trial, where the issue is fraud—the only question for the court is whether there was misrepresentation or concealment. If the court finds that there was fraudulent misrepresentation or concealment, such fraud, having occurred during the statutory period and as a part of the naturalization process, is evidence that the applicant was not a person of good moral character and his naturalization should be revoked on the grounds of both fraud and illegality.

The question is not, as propounded by defendant, whether the arrests that were concealed by defendant were material to his eligibility for citizenship.

At page 17 of Appellant's brief he seeks to minimize the oral preliminary examination of Naturalization Examiner White, contending that examination by the Designated Examiner (testimony not available because he is dead) is the only one that should be considered. As heretofore pointed out false statements during any stage of the naturalization proceedings has been held sufficient grounds for cancellation of Certificate of Naturalization. The preliminary examination by Naturalization Examiner White was in accordance with the rules and regulations (Exhibit 3) quoted above, and a part of the naturalization proceedings.

In *U. S. v. Anastasio, supra,* false statements made in a registry proceedings was held by the court to be a step in the naturalization proceedings and grounds to cancel

citizenship for fraud. The court said it was the duty of the petitioner to "fully and honestly disclose, both in his *application* and upon *oral* examination, his prior arrests and convictions." (120 F. Supp, at 440; emphasis provided.)

The evidence discloses that appellant made false statements in his Preliminary Form for Petition for Citizenship concerning his arrest ecord and repeated the false statements to Examiner White. Is it to be presumed that he changed this pattern in his examination before the Designated Examiner? In the absence of any proof to the contrary there is a strong presumption that public officials have properly discharged their duties. (*Lewis v. U. S.*, 279 U. S. 63; *Stone ex rel. Coloma v. Tillinghast*, 32 F. 2d 447, C. A. 1, 1929; *Daskaloff v. Zurbrick*, 103 F. 2d 579, C. A. 6, 1939.) It is not to be presumed in face of the statements in appellant's Preliminary Form for Petition for Citizenship and his testimony before Naturalization Examiner White that he told the Designated Examiner the truth about his arrests and convictions, and the Designated Examiner acted improperly.

The Appellant, at page 18 of his brief, refers to subsequent "depositions or investigation" in Detroit and infers that such depositions or investigation might relate to appellant's arrest record. Naturalization Examiner White testified (67a) with relation to the notations on the reverse side of the triplicate copy of the Petition for Naturalization (484a, Exhibit 2), and referred to a notation that meant "that depositions had to be taken in Michigan to cover the period of April 1, 1926, to June 14, 1929, and that they were presented". He undoubtedly referred to the notations "Deps Mich 4/1/26 to 6/14/29", and other notations indicating that the depositions were received and were "O.K.".

First of all, Naturalization Examiner White did not testify that an investigation was conducted (67a). He testified that depositions had been taken in Michigan. These depositions were taken in accordance with Fourth Subdivision of Section 4, Act of June 29th, 1906, as amended (45 Stat. 1514) which provided that residence within the United States but outside the county where the petition was filed (in excess of six months), and other qualifications required by the subdivision, shall be proved by depositions before a Naturalization Examiner or by oral testimony. Regulations thereto are contained in Rule 7, Subdivision D., Naturalization Rules and Regulations (Exhibit 3). These depositions in appellant's case were taken on printed forms as set forth in the Regulations and should be on file with the Clerk of the United States District Court, Brooklyn, New York. The witnesses making the depositions merely appeared before the Naturalization Examiner and, under oath, answered the printed questions on the form. No outside investigation would be conducted unless requested by the Naturalization Examiner (176a, 177a). The evidence does not disclose that any such investigation was conducted nor does it appear that the Naturalization officials had cause to request one, inasmuch as the appellant did not disclose his arrest record.

At page 18 of his brief, appellant infers that the court below should have ignored appellant's answer to Question 29 on his Preliminary Form for Petition for Citizenship and also his answers to Naturalization Examiner White that he had never been arrested; that inasmuch as said Preliminary Form for Petition for Citizenship was filled out by another that he should not be bound by the answers that appeared on said application. The District Judge made a finding, after full opportunity to hear and observe the appellant as a witness, that he did not believe appel-

lant when he testified that he failed to answer Question 29 truthfully because the person who helped him fill out his application informed him that if he had not served "time" the arrest did not count (503a). Appellant's brief, page 17, alleges that the District Judge, in making this finding in his opinion, had changed his position from the one he had adopted at the trial. But on February 8, 1954, during argument on the motion to reopen proofs filed by appellant, the District Judge stated that when he had made a finding at the close of the denaturalization trial that appellant spoke untruthfully when he said he went across the street and procured someone to prepare the preliminary application for him, that he meant that he did not believe the appellant when he said that the person who assisted him in filling out the application advised him that it was not necessary to list the arrests. (Appellee's Appendix 2b.)

An examination of the trial record shows that even if appellant were to be believed he concealed the complete record of his arrests from the person who assisted him (431a). He only informed that person of one offense—that he was arrested for investigation and paid a $25.00 fine for disturbing the peace.

Naturalization Examiner White testified, after referring to Exhibit 1 and notations on Exhibit 2, that the appellant affirmed his answer "No" to Question 29 in Exhibit 1 (62a-67a). There is only one reason for appellant to have concealed his record of arrests and convictions during the naturalization proceedings, and that is to fraudulently deceive the Naturalization Examiner and the Court—to preclude an investigation into his qualifications as a person of good moral character.

Appellant cites, as applicable to the facts in this case (Appellant's brief, page 18) the decision in the *Davis v. Commissioner of Internal Revenue*, 184 F. 2d 86, C. A. 10, 1950, which held that the false income tax return prepared by a competent, experienced, and reputable tax counsellor does not necessarily mean that the taxpayer committed fraud. The court said that the responsibility for filing a correct tax return is upon the taxpayer, but where it is shown that the tax collector was competent, experienced, and reputable and full information was provided him, it does not necessarily follow that the taxpayer is guilty of fraud for a false statement by the tax counsellor. The Court below has made a finding that he does not believe appellant when he said Question 29 of the preliminary application (Exhibit 1) was answered "No" on advice of an Immigration counsellor. But assuming that this appellate court believes appellant, the foregoing tax decision is not applicable to the facts in this case. In this case it is not even known who the Immigration consultant was. We do not know what was the experience of said consultant or whether he was competent or reputable. Furthermore, appellant did not disclose all his arrests and convictions to him. The income tax decision relied on by appellant concerned a tax consultant who received records from the taxpayer and because of the complexities of tax laws made many decisions without ever consulting the taxpayer. But in filling out the Naturalization forms the applicant must and did confer with the Immigration consultant.

Appellant deplores the fact that the court found that he had an improper purpose in answering Question 29 instead of a legitimate one. If appellant's arrest record consisted of only one or two offenses and he failed to disclose them his tale about his relationship with the Im-

migration consultant might be credible. We suggest that to expect the lower court of this court to believe that a legitimate, competent and reputable Immigration consultant would have advised appellant not to disclose a criminal record of at least fifteen arrests and two convictions taxes credulity to the limit. It is not reasonable to believe that if appellant had disclosed all of his arrests, the many times he has been at liberty on high bonds, his several arrests for robbery armed, his arrests for murder, that an honest or competent Immigration consultant, knowing that such information is required by the Naturalization officials in determining good moral character, would have advised appellant as he alleges.

Although the Government and the court below do not accept as true appellant's statement that he acted on the advice of a consultant, but assuming that he did it is pointed out that the Court of Appeals for this circuit has expressed the following rule:

> "It is now, however, very generally held that knowledge may be attributed to persons making false representations in circumstances where it is their duty to know whether such representations are true or false, or where they have the means of knowing the truth." *Anderson v. Tway*, 143 F. 2d 95, 99 (C. C. A. 6th, 1944.)

Even where a party innocently misrepresents a material fact by mistake or makes the misrepresentation without knowing it to be true or false, or may believe it to be true; or without reasonable grounds for believing it to be true, such misrepresentation will support an action for fraud. *Stein v. Treger*, 182 F. 2d 696, C. A. D. C. 1950: *Grand Trunk Western R. R. Co. v. H. W. Nelson Co.*, 116 F. 2d 823 (C. C. A. 6th, 1941).

Although faud is never presumed, it may be proved by circumstances which will also show the fraudulent intent or purpose for which the party acted. *Connolly v. Gishwiller,* 162 F. 2d 428 (C. A. 7th, 1947; cert. denied 332 U. S. 825). All the facts and circumstances prove solidly that appellant intended to deceive the Government.

> "The inferences to be gathered from a chain of circumstances depend largely upon the common sense knowledge of the motives and intentions of men in like circumstances." (*Connolly v. Gishwiller, supra,* at page 433.)

The appellant's error is that he did not disclose information to the Government that it was entitled to know. Appellant's reaction to the detection of his fraud by the Government is to attempt an explanation. This is to be expected in any case where the defendant has committed a wrong. He seeks to show his innocence by attempting to establish no intent, lack of understanding, or ignorance. The court, in *Del Guercio v. Pupko, supra,* in commenting on the defendant's efforts to explain away her false statements said:

> "Her professed purpose was, not to make a disclosure of the incident at some later and supposedly more opportune stage, but merely to attempt an explanation in the event the Service should chance to stumble upon the truth. There is nothing unique in such a motive; doubtless much the same idea animates every aspirant for citizenship who gives an untruthful answer to a material inquiry. Should the courts condone these deceitful practices the whole procedure preliminary to naturalization would be effectively undermined and the declared purpose of Congress frustrated."

In an attempt to further excuse himself, appellant refers to his "limited education" and his "third-grade" education (Appellant's brief, pages 18, 20) and argues that this is proof that he did not intentionally misstate the truth. A study of appellant's testimony, his sparring and evasive tactics with the District Attorney, does not depict a person of little intelligence. Appellant, being of foreign birth, may not speak accurate English but it has no bearing on his intelligence. His repeated "I do not remember" (351a, 352a, 356a, 365a, 378a, 379a, 383a, 385a, 392a, 406a, 409a) to relevant questions relating to his arrests, as contrasted with his ability and willingness to recall events supporting his own cause does not conform to a man of limited intelligence. He recalled what took place at his naturalization proceedings when it aided his cause but conveniently could not recall details relating to his arrests, not even an arrest for murder except in a few instances upon repeated questioning by the District Attorney.

On page 19 of his brief, appellant infers that it is naturalization Examiner White's testimony that the latter is able to recall that he asked appellant about his arrests only because it was the practice to ask such questions. This is not the gist of White's testimony. He testified at the trial only after examination of the Preliminary Form (Exhibit 1) and the Petition for Naturalization (Exhibit 3) and identifying his check marks which were made by him at the time of examination of appellant and which are presumptively correct. He testified that the check marks meant that the questioned appellant concerning the particular items checked (64a, 65a), to determine whether the answers thereon were correct. He explained that the notation "NCR" (abbreviation for No Criminal Record) was made by him and meant that at the examination in 1931 appellant said he had no such record (67a). It was

Naturalization Examiner White's job to examine applicants for citizenship to determine if they possessed the necessary qualifications for citizenship (75a-85a), and by regulations he was required to inquire into the record of arrests in order to determine in what manner said record reflected upon the petitioner's good moral character. In performing his duties he reviewed the preliminary form with the petitioner, and if the answers thereon were correct he checked them (75a-76a). He often supplemented the questions in the form with his own questions (76a, 83a, 84a). The Regulations (Exhibit 3; Rule 1, Subdivision D, Paragraph 2) require that "The questions will be repeated in different form and elaborated until the Examiner is satisfied the person being interrogated fully understands them."

Appellant notes that no explanation was given as to why there was not submitted in the court below the stenographic transcription of the questioning of the appellant by naturalization officials, inferring that such record existed. First of all, there is no evidence that such record existed. A glance at the Rules and Regulations quoted above (Exhibit 3; Rule 1, Subdivision D, Paragraph 2), concerning preliminary examination, sets forth that "The principal purpose of such examination is to obtain information bearing upon the applicant's admissibility to citizenship and the qualification of the witnesses rather than to obtain responses for record purposes."

Naturalization Examiner White did not remember the appellant and no improper motive can be imputed to him. In fact he has not been employed by the Naturalization Service for many years. An examination of White's testimony discloses that he still has a very good recollection of naturalization procedure. The answer "No" to Question 29 on the preliminary form was placed there by ap-

pellant or his agent. White's initials, check marks, and notations were placed on the exhibits over twenty years ago. White's testimony merely interpreted and explained them. Appellant has been unable to point to a single contradiction on the part of White.

The court below stated that "It is apparent to this court from the testimony that defendant went to New York to make his application for citizenship because of his long police record in Detroit" (508a). Appellant argues that there is no basis for this finding (Appellant's brief, page 20). Although such finding was not necessary to the decision of the lower court, it is amply supported by the evidence. Appellant was arrested under an indictment for murder on February 19, 1929, prior to moving to Brooklyn, New York (306a, 35a, 355a). He went to Brooklyn shortly after he was married on June 1, 1929 (323a). Immediately after his arrest on February 19, 1929, for murder and his subsequent discharge he was investigated by the United States Immigration Service on March 15, 1929. Therefore, appellant was well-aware that the United States Immigration and Naturalization Service in Detroit was cognizant of his criminal record in that city. Appellant was well-known to the detectives in the Black Hand Squad Detroit Police Department (263-264a, 279a-280a, 283a, 301a, 313a, 314-317a), which investigated crimes perpertrated between Italians (279a), because of his numerous arrests by that squad. What other inference can be taken "upon common sense knowledge of the motives and intentions of men in like circumstances?" *(Connolly v. Gishwiller, supra)*, when after leaving Detroit and upon applying for citizenship he denied that he had ever been arrested or charged with any offense, when he well knew he had been arrested many times in Detroit; that the Immigration and Naturalization Service was aware of these

arrests; that he had been indicted for criminal offenses, including murder; arraigned in court; that he had executed several sizeable bonds in connection with his arrests (357a, 401a, 422a), (one bond amounting to $10,000 (409a) and another bond amounting to $15,000 (418a, 424a)), except that appellant was seeking to escape his unsavory record in Detroit. It is an inescapable conclusion that he had reason to believe that unfavorable action would have been taken on his Petition for Naturalization in Detroit.

Appellant again, on page 20 of his brief, seeks to imply that the depositions taken in Detroit, in connection with appellant's petition for naturalization, were made on the "recommendation" of the Preliminary Examiner. As pointed out heretofore, the depositions were taken in compliance with a requirement of the law and regulations. They were not taken in connection with any recommendations made by the Preliminary Examiner. Such depositions were routine and required and did not place the Detroit Naturalization office on notice that appellant had an arrest record and that such record should be investigated. The depositions were taken from witnesses named by the appellant, not witnesses procured by the government.

Appellant testified that he filed his petition in New York "when he lived in Michigan" (323a). This statement, if correct, would be further grounds to support cancellation of appellant's citizenship for the reason that the District Court in New York could not have naturalized him if he resided in Michigan. Furthermore, if his residence was in Michigan rather than in New York, he then made false statements in Exhibits 1 and 2, when he stated he resided in Brooklyn. It is submitted that it is not by mistake that appellant testified that he was living in Michigan when he filed his petition in New York, but that it was an unintentional admission on the part of the appellant that his

absence in New York was one of convenience and that Michigan was really his home.

In *U. S. v. Rossini,* 52 F. Supp. 816, cited by appellant on page 21, the court stated that the burden was upon the government to prove fraud. It is conceded that the government must prove fraud by clear, convincing, and unequivocal evidence but once fraud is proven the court has no alternative but to cancel citizenship. This court is not primarily concerned now with what the naturalization court should have decided if it had known all the facts. It is only concerned if the applicant for citizenship by "perjury, misrepresentation, falsification, or concealment" did not disclose information that the government was entitled to know and thereby thwarted proper investigation into his qualification for citizenship. In the *Rossini case* the judge stated that in a denaturalization case it is not material what his opinion is "as to what the finding should have been on the hearing for admission * * *" (52 F. Supp. at 819).

Appellant quotes from a note in *U. S. v. Kessler,* 213 F. 2d 53, C. A. 3, 1954, which quotation states that the court had found *no decision nor were any cases cited where citizenship had been revoked for failure to disclose facts,* the revelation of which would not have justified refusal of citizenship in the first place. It is difficult to know what the court intended by that statement. But if the court meant that before it can denaturalize a person it must first determine whether that person would have been admitted to citizenship in the first place, even if he had told the truth, we respectfully submit that the court is in error as far as denaturalization cases involving *fraud* are concerned. (It is true that in denaturalization cases, where the complaint charges that naturalization was *illegally* procured, that the court must necessarily find that the applicant for citizen-

ship was not eligible or qualified for citizenship in the first place.) We will proceed to cite a few cases which the Court of Appeals, Third Circuit, apparently overlooked.

First of all, in this Circuit is *Charnowola v. U. S., supra,* the Court of Appeals cancelled naturalization of a person who failed to disclose his membership in the Communist Party during the naturalization process. At the denaturalization trial the government proved that the naturalized citizen, Charnowola, had been a member of the Communist Party prior to the ten-year statutory period. While the law prohibits the naturalization of aliens who had been members of a proscribed organization, it excepted any applicant for naturalization who at any time within the period of ten years immediately preceding the filing of his petition for naturalization was not a member of a proscribed group. No proof of Charnowola's Communist Party membership within the statutory period was offered. This court accepted the statement of the lower court that the gist of the action to cancel citizenship for fraud was the false information which the petitioner gave the Naturalization Examiners.

In *U. S. v. Saracino, supra,* (decided by the Third Circuit which has also decided the Kessler case) naturalization was cancelled merely because petitioner had lied about his criminal record. The Court held that this was information that was wrongfully withheld from the Naturalization Examiner and the court made no determination whether Saracino would or would not have been naturalized if the information had been disclosed.

In *U. S. v. Mancini, supra,* this court held in cancelling citizenship for failure to disclose arrest record that this information had a bearing on good moral character and, consequently, a false statement concerning it is grounds for cancellation. No finding was made by the court that

the arrest record if disclosed would have precluded petitioner from citizenship.

In the *Kessler case, supra,* it is to be noted that there is a strong dissent by Circuit Judge McLaughlin (213 F. 2d at 59). In that case Reba Kessler answered "No" to the identical question that appears in Question 29 (Exhibit 1). In fact, she had been arrested seventeen times, which arrests she failed to disclose to the Naturalization officials. The majority opinion delved into the legality of the arrests and held that they were illegal. The dissent strongly opposed this action by the majority court and on the question of materiality of the false statement pointed out that "It is not the matters concealed but the fact of concealment which constituted the fraud for which a suit for denaturalization lies." The dissent further pointed out, contrary to the statement in the note in the majority opinion, that the cases hold that a false answer in a naturalization proceeding is sufficient ground for denaturalization, "irrespective of whether the facts concealed would have been a bar to the grant of citizenship had they been known to the court at the time of naturalization" (213 F. 2d at 61).

The dissent, quoted from *U. S. v. Saracino* above, a decision rendered by the Third Circuit, and referred to *U. S. v. Accardo, supra,* decided by the Third Circuit, which sustained the cancellation of citizenship of Accardo for failing to disclose his arrests and convictions. The dissent stated further concerning the decision in the Accardo case (213 F. 2d at 61):

> "Deciding that the nondisclosures constituted fraud for which revocation would lie the district court said, 'It was defendant's duty to disclose an arrest, as well as a conviction, *in order that the Government might investigate before granting the decree.*'" (Emphasis supplied.)

The dissent cited as further authority for its position, the decision of the Sixth Circuit *Russo v. U. S.*, 127 F. 2d 171, 1942, wherein this court cancelled citizenship on the ground that appellant made wilful false statements; *U. S. v. Goldstein, supra; U. S. v. Marcus, supra; U. S. v. DiBlasi,* 1 F. Supp. 28, D. C. N. J. 1932; and *U. S. v. Etheridge, supra.*

In *Stevens v. U. S., supra,* the Court applied the same rule as in the Charnowola case to false statements about an arrest record. The Court of Appeals, 7th Circuit, held it was immaterial that the false statements concerned arrests outside the five-year statutory period, holding that the concealment of arrests was the only fact the court was concerned with in a denaturalization case for fraud.

In *U. S. v. Anastasio, supra,* the latter was denaturalized for a false statement concerning his criminal record made during the naturalization process. The Court, in effect, held that it was only concerned with whether the question which was answered falsely "was relevant and material to the subject matter of inquiry."

In *Gaglione v. U. S., supra,* the Court convicted the defendant for a false swearing for failing to disclose his arrest record in the naturalization proceedings. See also *Rein v. U. S., supra,* decided by the Third Circuit and quotation therefrom heretofore cited.

In *Brenci v. U. S., supra,* the First Circuit held that a concealment of a conviction whether or not it involved moral turpitude was grounds for cancellation of citizenship. The Court said the only issue was the false statements. The Court was not concerned whether the conviction did or did not involve moral turpitude, and if disclosed, may not have been a basis for denying citizenship in the first place.

In *Cufari v. U. S., supra,* in holding that a false denial of arrests is sufficient to cancel citizenship, stated as follows (217 F. 2d at 408-9):

> "The controlling question here is not whether Cufari's arrests were legal, cf. *United States v. Kessler,* 3 Cir., 1954, 213 F. 2d 53, or the seriousness of the charges laid against him, or the validity of those charges. *It is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative."* (Emphasis provided.)

The foregoing does not exhaust all the cases on the question of materiality of false statements in a denaturalization suit but it is sufficient to show the court that the majority decision in the *Kessler case* was not accurate, in its note quoted by the appellant. We repeat that in a suit for cancellation of citizenship, based on illegality, the issue is whether or not citizenship should have been granted in the first place, but where the complaint for denaturalization charged fraudulent procurement, it is immaterial whether the fact not disclosed would or would not have prevented naturalization in the first instance (See *Kessler v. U. S., supra,* dissent 213 F. 2d at 62).

The court below found that appellant lied when he stated in his preliminary application and also to the Naturalization Examiner that he had never been arrested or charged with any offenses. The burden was on the appellant at the time he filed his petition for naturalization to show that he was a person of good moral character, attached to the Constitution and well disposed to the good order and happiness of the United States during the period required by law. The Government was entitled to inquire in connection therewith into petitioner's conduct prior to the statutory period,

as well as during the period. The Government was entitled to know if the petitioner was ever arrested or charged with any offenses, and if so, to conduct an appropriate investigation before making a determination whether he was a person of good moral character, etc. during the required period (*Sweet v. U. S., supra*).

The finding of fact by the District Court of appellant's fraudulent procurement of naturalization was supported by substantial evidence, and the conclusions of law were based upon logically correct reasoning supported by highest authority and not clearly erroneous.

QUESTION II

IS INTRINSIC FRAUD A BASIS FOR DENATURALIZATION?

The Court below answered "Yes".
The Appellee contends that the answer should be "Yes."
The Appellant contends that the answer should be "No".

A false or fraudulent statement concerning a material fact, or the concealment of a material fact, is ground for revocation of naturalization previously granted. The appellant once more ignores the definition of fraud in a naturalization proceeding as defined by the Supreme Court in *Knauer v. U. S., supra,* as connoting "perjury, falsification, concealment, misrepresentation." It would be surplusage to recite at this point the numerous authorities which have held contra to appellant's contention. This court has recently ruled on this issue in *Sweet v. U. S.,* 211 F. 2d 118, and quoting the *Knauer case* held:

> "That fraud as a statutory ground for denaturalization need not be extrinsic."

QUESTION III

WAS ILLEGAL PROCUREMENT OF NATURALIZATION ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE?

The Court below answered "Yes".
The Appellee contends that the answer should be "Yes."
The Appellant contends that the answer should be "No".

Good moral character is a jurisdictional prerequisite to a grant of citizenship. The Fourth Subdivision of Section Four of the Act of June 29, 1906, as amended by the Act of March 2, 1929 (45 Stat. 1513) provides that:

> "*No alien shall be admitted to citizenship* unless • • • during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States." (Emphasis provided.)

Consequently, if the appellant during the five-year period prior to the date of his petition for naturalization did not behave as a person of good moral character, etc., he was not eligible for naturalization and if naturalized his citizenship is subject to cancellation (Sec. 338(a) of the Nationality Act of 1940 (8 U. S. C. 738(a)) on the grounds that it was *illegally procured.* Section 301(d) of the Nationality Act (8 U. S. C. 701) provides:

> "A person may be naturalized as a citizen of the United States in the manner and *under the conditions prescribed in this chapter, and not otherwise.*" (Emphasis provided.)

Since being a person of good moral character is a condition precedent to naturalization, if this condition did not

exist in fact, defendant has procured his naturalization illegally.

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with, and every certificate of citizenship must be treated as granted upon condition that the government may challenge it as provided in Section 15 (Act of June 29, 1906, now 8 U. S. C. 738) and demanded cancellation unless issued in accordance with such requirements. If procured when proscribed qualifications have no existence in fact it is illegally procured * * *." (*U. S. v. Ginsberg*, 243 U. S. 472. (Parenthetical insertions provided.) See also *Beaumgartner v. U. S.*, 322 U. S. 565, and *Tutun v. U. S.*, 270 U. S. 568.)

Under facts very similar to the circumstances of this case, the court cancelled citizenship on the grounds of illegality (as well as for fraud) in the case of *United States v. Accardo, supra,* for the reason that the defendant during the statutory period had not been a person of good moral character, etc. On the issue of illegality the court had this to say at 113 F. Supp. page 786:

> "We turn now to the question of illegality, i. e., whether the naturalization certificate was procured illegally, in that the defendant, for two years prior to filing his naturalization petition, and through the time of his obtaining his decree, had not been 'a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States'. First we bear in mind that it was during this period that defendant wilfully concealed from the governmental authority his above arrests and convictions, which obviously had such a material bearing upon the court's determination to grant him his naturalization decree. Those fraudulent acts *per se* revealed his character as that of one willing to

defraud others, even including the Parens Patriae, for his own ends. Since we here consider defendant's character only, defendant's contentions as to the notice to the government as to some of this record becomes irrelevant, even if this contention were not fallacious. It is too clear for argument that the above fraud of itself shows defendant was not then 'of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States.' *Del Guercio v. Pupko*, 9 Cir. 1947, 160 F. 2d 799, 800; *Stevens v. U. S.*, 7 Cir. 1951, 190 F. 2d 880; *Gaglione v. U. S., supra. How can a person claim to be of good moral character or well disposed to the good order and happiness of the United States at the very time he is seeking to defraud the United States in a matter of moment both to him and to the country?*" (Emphasis provided.)

The lower court found by clear, unequivocal, and convincing evidence that the appellant had committed a fraud on the government. It is respectfully submitted that logic would require a finding that the appellant was not a person of good moral character. This finding of fact to-wit: "that appellant was not a person of good moral character", was based upon substantial evidence and is not clearly erroneous hence the appellant's denaturalization should be affirmed on the basis of illegal procurement.

QUESTION IV

WAS THE NATURALIZATION JUDGMENT RES JUDICATA?

The Court below answered "No".
The Appellee contends that the answer should be "No".
The Appellant contends that the answer should be "Yes".

Once again we are confronted with an argument raised by the appellant that has recently been decided by this circuit in the cases of *Sweet v. U. S., Chomiak v. U. S.*, and *Charnowola v. U. S., supra.* In the *Sweet* and *Charnowola* cases this court allowed the government an independent opportunity to inquire into the naturalization of the defendants and to prove that their citizenship had been procured by fraud. This court likewise ruled in the *Chomiak* case that a determination of citizenship by the naturalization court is not *res judicata* where it is illegally procured. Previously discussed in this brief is the fact that naturalization is *ex parte* in nature. The facts in the instant case show that there was never a judicial finding of good moral character. It was not an adversary proceeding. The underlying principle of *res judicata* requires that the parties have their day in court. Under the statutes and decided cases, a certificate of naturalization is subject to revocation in a denaturalization proceeding and is not barred by the doctrine of *res judicata.*

CONCLUSION

Upon this Court, as well as all the other Naturalization Courts throughout this country, lies the responsibility of maintaining the high naturalization standards established by Congress. Congress provided that candidates for naturalization shall possess certain prerequisites at the time of application for citizenship or they shall be denied admission to citizenship. The duty of determining whether petitioners qualify for citizenship is with the courts—with great reliance placed upon Naturalization Examiners. The courts must of necessity, because of the hundreds of applications for citizenship, frequently rely entirely upon the recommendations of the Naturalization Examiner. The latter in turn depends primarily and principally upon representations and disclosures made by the petitioner. Inasmuch as considerable faith is placed upon the petitioner to speak truthfully and with candor, when he breaches that trust, the courts do not hesitate to rectify the damage. Any other course would invite a scandalous naturalization condition that existed prior to the passage by Congress of the basic naturalization law in 1906, which law also warned that any naturalization procured in noncompliance with the law or by fraud would be subject to revocation.

The Naturalization Examiner relying on the truthfulness of defendant's statements recommended to the United States District Court in Brooklyn that defendant be naturalized. The Court, accepting that recommendation, without further examination of the petitioner, admitted him to citizenship. The defendant, by falsely stating that he had never been arrested or charged with any offenses, knowingly misled the Naturalization Examiner and the Court

and precluded an examination into his good moral character. Such action, a deceit and fraud upon the Court, did not exemplify the behavior of a person worthy of naturalization.

A statement by petitioner that he had never been arrested or charged with any offense is evidence to support his claim that he is a person of good moral character. A record of arrest challenges or may completely disqualify the petitioner as a person of good moral character or as a person well-disposed toward the good order and happiness of the United States. It is submitted that the record of arrests in defendant's case portrays him as lacking in good moral character and not well disposed toward the good order and happiness of the United States.

To permit defendant to retain his citizenship after a finding by the Court that he had lied concerning his criminal record in the process of obtaining his enfranchisement would be rewarding him for a fraud upon the Court. It would violate the high standards for naturalization prescribed by Congress.

The Court has found that the defendant was not truthful during the naturalization proceedings. It is urged that defendant's false statements were a fraud upon the court justifying cancellation of his citizenship on the grounds of fraud and illegality.

RELIEF

Wherefore, the appellee prays that the judgment below be affirmed.

Respectfully submitted,

FRED W. KAESS,
United States Attorney,

By DWIGHT K. HAMBORSKY,
Assistant U. S. Attorney, and

JOSEPH SURECK,
U. S. Immigration and Naturalization Service,
Detroit, Michigan,
Attorneys for Appellee.

APPENDIX

TRANSCRIPT OF MOTION TO RE-OPEN PROOFS

Transcript of proceedings in the above cause on motion to re-open proofs before Hon. Frank A. Picard, District Judge, at Detroit, Michigan, on Monday, February 8, 1954.

Appearances: Dwight K. Hamborsky, Assistant United States Attorney, appearing on behalf of the United States; I. A. Cappizi, 2329 National Bank Bldg., Detroit 26, Michigan, and appearing on behalf of the defendant.

PROCEEDINGS

Detroit, Michigan.
Monday, February 8, 1954.
11:00 o'clock A. M.

Mr. Capizzi: Your Honor, the defendant has filed a motion to re-open the defense to permit him to introduce testimony as to conditions which existed around the court house with reference to persons advertising to assist in the filling out of applications for citizenship at the time Mr. Corrado made his application.

Now, the reason we are asking for it at this time is this: At the conclusion of the case, the defense counsel definitely got the impression from something the court said that the court possibly disbelieved Corrado's statement that when he made application, when he went to the court building and obtained the application form and he looked at it and couldn't—realized he couldn't fill it out himself, and as he walked out he saw some of these places across the street which advertised assistance in the filling out of such papers.

We inquired. We found some of those places not only did exist but they still exist today, and we attached to our motion photostatic copies of photographs recently taken of these places just one block from the court house which advertise assistance in filling out citizenship applications.

We have approximately twelve affidavits from lawyers, most of them lawyers who practiced at that time, at the time Corrado made application, from newspapermen, from policemen, who all attest to the fact that these places which still exist today existed then, at that time.

Now, I asked counsel if they would stipulate, because if that is a fact, why put us to the expense. If the court should grant our motion, I think we could work out something to prevent a great deal of expense to the government and in taking depositions. We can possibly stipulate that those are the facts or were the facts at the time, after they have made investigation.

That is all we are asking at this time, is the opportunity to present such proof, either in the form of a stipulation or depositions from some of these witnesses over there.

The Court: What is the position of the Government?

Mr. Hamborsky: The position of the Government is simply this: That this is a very insignificant part to the whole Government's case. It is immaterial. And that the case should not be re-opened for proofs on this point.

The Court: I think it is a very important point. But when he says that the court intimated he did not believe the defendant he was putting it mildly. I told him I did not believe him, just as strongly as I could.

He said that he went into one of these places and he told the man that he had been arrested a couple of times, but for some unknown reason the man did not put it down. And that seemed to so far-fetched to me that I told him that I did not believe his story.

If his story is true—if his story is true or if it helps to raise a doubt as to whether the evidence on the side of the Government is clear and convincing—and I think that is the language of the Supreme Court—that might be very important to this man.

Mr. Cappizzi: Your Honor, I—

The Court (interposing): There is another point, however, and that is the court permitted the defendant to choose whether evidence could be introduced to show what kind of an American citizen he had been following 1931. Do you remember that, Mr. Hamborsky?

Mr. Hamborsky: Yes, sir.

The Court: I think that the Government should have the right to put in that. It has been done in other cases. Of course, now, here is a man that gets his citizenship in 1931. It should be, in my opinion—it should be, "What was the situation at that time", and not after 1931, but the courts have permitted that evidence to be shown.

Mr. Hamborsky: Well—

The Court (interposing): I would like to, if I was going to open this at all, I would like to not only permit the defendant to show that there was such a place over there in—where was it? Buffalo, New York?

Mr. Cappizzi: New York City; Brooklyn.

The Court: Brooklyn?

Mr. Capizzi: Brooklyn, New York. Yes, your Honor.

The Court: So I think we ought to take the testimony on that other, too. What kind of a citizen was this man since 1931; that might bear upon whether or not he was telling the truth or whether he is telling the truth now, as to whether or not he had told them about his arrests. Of course, the Government's case is weak in this, that the only arrests that they have got against this man—the only actual arrests were two, and I guess they let him out on both of them. Of course, he claims he doesn't remember them, but he put up a big bond and had some of the best lawyers in the city at that time defend him, and finally the court threw it out. I just can't understand that. What do you think about the other? Do you think you might want to change your mind on that? I might want to, anyway.

Mr. Capizzi: Well, I would like to talk to my colleague.

The Court: All right.

Mr. Cappizzi: Who is not handy this morning.

The Court: I have your position and I will rule on it, but I would like to have you—I might permit the Government to come in and to show what kind of a citizen he was after '31.

Now, I think that you and your colleague—this is my deduction and doesn't mean anything—I think that you and your colleague did not want to show what kind of a citizen he was after '31 because if I should take his citizenship papers away that didn't mean he would be deported, but that if the Government was able to show what kind of a citizen he was after 1931, and it wasn't good, that then the chances would be he would be deported. That may be the reason. I don't know. I don't ask you to tell me under the Fifth Amendment. You can take advantage of that, Mr. Capizzi.

I will think that over. I am inclined to give him a chance, because to take a man's citizenship papers away from him is pretty serious.

Mr. Hamborsky: However, I would like to point out this, your Honor. It is my understanding from Mr. Capizzi's motion that this testimony of Mr. Corrado as to what he told the examiner is not being raised to be re-opened at this time.

Mr. Capizzi: Oh, no.

Mr. Hamborsky: The only thing that is being raised at this time is whether or not there was actually these various places that serviced this citizenship application across the street from the Brooklyn Court House.

The Court: I know it. But up to this time you haven't got any evidence at all to show that there were such places. You see that?

I know they are down here, right across the street. There are any number of them. I don't know what difference it makes.

(Mr. Sureck entered the room at this point.)

The Court (continuing): But I want to give this man a chance to put in every bit of testimony he can. Now, I might be governed somewhat by the other. It is within the discretion of the court. But when you take a man's citizenship papers away, you have to have clear and convincing evidence.

And if I immediately shut out all of their chance of proving that, I don't know as I have been exactly fair.

Here comes your associate. You had better sit over there in the corner and talk it over with him.

(Mr. Kobel entered the room at this point.)

Mr. Kobel: Sorry, you Honor. I was up in Judge Levin's court.

The Court: All right. Talk it over. May I suggest this, also—where are they?

The Clerk: In the hall.

The Court: Mr. Kaess, you tell them this: It would materially help their case if they were able to find out whether this man that signed this paper for him, or helped him make it out, was—what his name was, because you know the mysterious stranger, to me, is always a very illusive person in any lawsuit.

The first lawsuit I ever tried was a criminal case. I was assigned to it by the court. You may take this off the record.

(Discussion off the record.)

(Short intermission.)

The Court: What have you decided?

Mr. Capizzi: We have decided to limit it merely to this one phase that we set forth in our motion.

The Court: Suppose I would say anyway to open it. Is there any case you have got that tells me I can't make inquiry after July—what is the date? After 1931?

Mr. Hamborsky: After 1931.

Mr. Kobel: Well, the cases in which this arose, your Honor, came about as the result of the investigations into Communists and Nazi affairs, and those cases, Schneiderman, Baumgartner, and so on, dealt with another phase of denaturalization, the oath of allegiance and their willingness to take the oath to the United States with mental reservations.

The Court: Will you do this: Will you give me the citations that you depend upon to substantiate your position that I should not make inquiry after 1931. Give it to my law clerk. I don't want you to write a brief, unless you want to. I don't think you want to now. And will

you also look into that, Mr. Hamborsky, because I am inclined to inquire into that phase if I open this investigation or this case for more testimony. I believe you would be entitled to that, which would make the other more easy.

I tell you now, if you agree to that, I think that is important enough so I might say, "While we are opening the matter, I will take in the other, too."

Mr. Hamborsky: Well, let me say this: That if the defendants in this matter are opening it for the purpose for which they filed the motion, and no other evidence, I will say on the reopening of the proofs the government is content to rest on what is in the record. If they are opening it for other purposes—

Mr. Capizzi (interposing): No, no.

The Court: Well, I haven't read it yet. I don't know what it is.

Mr. Capizzi: The only purpose—that is the only purpose.

Mr. Hamborsky: I say, if that is the only purpose, then the Government is content to rest on the record.

Mr. Capizzi: That is definitely the only purpose.

The Court: Then you don't ask to have the other, to meet the information that is contained in the motion?

Mr. Hamborsky: Yes. Here is what I would like, your Honor. This is the status of the matter at the present time. It is my understanding a week from today Mr. Kobel will file his reply brief to the Government's brief.

The Court: Haven't you filed that yet?

Mr. Kobel: No. I was—I saw your Honor last Monday on it.

The Court: You waved at me last Monday, but I didn't take that as a motion.

Mr. Kobel: You gave me two weeks to file a reply brief. As a matter of fact, it is beeing typed right now.

Mr. Hamborsky: And then, as I understand it, the Government has five days to answer the reply brief.

The Court: All right.

Mr. Hamborsky: Now, of course, what I would like to suggest—

The Court (interposing): I will hold this in abeyance, temporarily, anyway. The longer this case takes, as far as the defendant in this case—he is not in jail?

Mr. Kobel: No, sir.

Mr. Capizzi: No, your Honor.

The Court: He won't be antagonistic to any delay.

Mr. Kobel: No.

The Court: All right. All right. I would like to get all the information I can. I don't want to do him an injustice, and at the same time I felt pretty strongly on this other point. I didn't believe it at all. This doesn't make me believe it, but it helps your case. I haven't looked at it, incidentally, I don't know what it says.

Mr. Kobel: You want us to submit the affidavits?

Mr. Capizzi: May we file some affidavits in support of the motion?

The Court: Yes. Put them all in together.

Mr. Kobel: All right.

State of Michigan,
County of Wayne—ss.

I, Donald B. Severance, do hereby certify that I reported in shorthand the proceedings in the above entitled cause before Hon. Frank A. Picard, District Judge, at Detroit, Michigan, on Monday, February 8, 1954, and that the foregoing transcript, consisting of twelve typewritten pages, is a true, full and accurate record of said proceedings.

Donald B. Severance,
Official Court Reporter,
707 Federal Building.
Detroit 26, Michigan.

Dated: May 2, 1955.